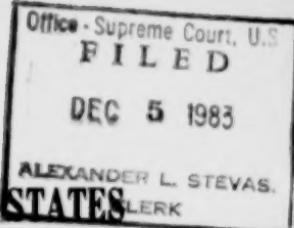


No. 83-447



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SEA-LAND SERVICE, INC.,

Petitioner

against

CARL O. AKERMANIS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. When the court of appeals, at the urging of both the Petitioner and the Respondent, reversed the judgment of the district court on the ground that the district court did not have legal authority to order a remittitur based on an alleged error by the jury in assessing the degree of contributory negligence attributable to the Respondent, did the court of appeals have authority to remand the case to the district court with instructions to reconsider the district court's order which had conditionally granted a new trial to the Petitioner if the Respondent did not accept the remittitur?
2. After the court of appeals reversed the district court's judgment, without specific instructions from the court of appeals, did the district court have authority to reconsider its order conditionally granting a new trial or was the district court bound to proceed with the new trial even though it concluded that the new trial had been erroneously granted?
3. Did the district court err on remand when it concluded that the jury's assessment of 4% contributory negligence was correct and that a new trial should not be granted and therefore entered judgment on the jury's verdict?

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STATUTE AND RULE INVOLVED

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rule 50, Federal Rules of Civil Procedure

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party

who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

COUNTERSTATEMENT OF THE CASE

The Respondent, a veteran seaman, sued his Employer, the Petitioner herein, under the Jones Act (46 U.S.C. §688) for injuries sustained on June 4, 1977 while working on board the Petitioner's ship. Suit was commenced in 1977. The case was tried before a jury in June 1981. In response to detailed interrogatories submitted by the district court, the jury found that the Petitioner's negligence proximately caused the Respondent's accident and the jury assessed damages in an amount in excess of \$500,000. Also in answer to a special interrogatory, the jury found four percent contributory negligence on the part of the Respondent.

In response to the Petitioner's post-trial motions, the district court in a Memorandum, Opinion and Order dated October 14, 1981 (Appendix C)¹, 521 F.Supp. 44 (S.D.N.Y.), denied the motion for judgment n.o.v. but granted a motion for a new trial on liability only unless the Respondent accepted a remittitur of all damages "in excess of that amount resulting from application of a 25% reduction for contributory negligence."

The Respondent accepted the remittitur and consented to the entry of judgment reflecting the twenty-five percent contributory negligence assessment made by the district court. In filing his consent to the entry of judgment on the reduced jury verdict, the Respondent specifically did not "waive any rights which [he] may have to cross-appeal in the event of an appeal by the [Petitioner]" (Appendix I).

After the district court entered judgment on the reduced verdict (Appendix E), the Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Respondent filed a cross-appeal.

The decision of the court of appeals, dated September 14, 1982 and reported at 688 F.2d 898, is set forth as

1. All references are to the Appendices to the Petition for Writ of Certiorari.

Appendix A to the Petition. The court held that it was improper for the district court to order a remittitur based upon an alleged error in the jury's assessment of contributory negligence. Both the Petitioner and the Respondent argued to the court of appeals that the remittitur was improper; the Petitioner does not attack the conclusion of the court of appeals. Based on its holding that the remittitur was improper, the court of appeals vacated the district court's judgment.

The court then discussed whether it had jurisdiction over the cross-appeal. It concluded that it did despite the general rule, confirmed in *Donovan v. Penn Shipping Co.*, 536 F.2d 536 (2d Cir. 1976) affirmed Per Curiam, 429 U.S. 648 (1977), that a plaintiff who accepted a remittitur waived his right to appeal. The court of appeals found itself confronted with an issue "of first impression in the federal courts" (A-1).

The court of appeals reasoned that the general rule should not be applied in this case where the remittitur related not to damages but to contributory negligence. The appellate court found that the district court did not have legal authority to interfere with the jury verdict by way of such a remittitur. Since the district court had no authority to order the remittitur, the Respondent's acceptance of the remittitur could not and should not serve as a bar to the Respondent's right to appeal.

Although the court of appeals did not specifically so hold, it is submitted that when the court of appeals held that the remittitur was improper, and therefore reversed the district court judgment, the district court's order conditionally granting a new trial was necessarily vacated. The court of appeals concluded that it would be unfair and impractical to hold that the Respondent had waived its right to appeal from a remittitur which was improper not because of an abuse of the district court's discretion but because of the court's lack of power.

In reality what the court was saying was that the order granting a new trial was conditioned upon the Re-

spondent accepting the remittitur. Since there was but a single judgment and a single order by the district court, in fairness, as a matter of common sense and as a matter of sound jurisprudence, the failure of the condition because of legal impossibility, rendered the entire order (including the conditional grant of a new trial) null and void. The court of appeals concluded that the rule prohibiting an appeal by a plaintiff who accepted a remittitur simply did not apply where the court lacked the authority to order such a remittitur.

The court also reasoned that since the Petitioner's appeal was properly before it and had been ruled upon, judicial economy and efficiency dictated that the court should entertain the Respondent's cross-appeal. In so holding, the court of appeals relied upon its power under Rule 50(c) and (d) of the Federal Rules of Civil Procedure to entertain an attack on an order conditionally granting a new trial.

Although the court of appeals discussed issues raised by the Respondent in its cross-appeal, in fact and in law, the court of appeals did not enter any order as to the cross-appeal. The court of appeals did not order the district court to deny or grant a new trial. The court left that decision to the district court in the exercise of the district court's discretion based upon the district court's "feel" of the case. The court of appeals did offer suggestions to the district court as to the options available to the latter on remand.

The court of appeals' first decision was issued on September 14, 1982 (Appendix A). The Petitioner's Petition for Rehearing In Banc was denied on October 28, 1982 (Appendix B).

On remand, after the submission of briefs by the parties, the district court considered whether a new trial was warranted. On January 18, 1983, eight days prior to the filing of the first Petition for Certiorari in this Court

(No. 82-1302), the district court on remand issued a Memorandum, Opinion and Order (Appendix F) in which it considered and denied the Petitioner's motion for a new trial.

The district court concluded, in the exercise of its discretion and for independent reasons not discussed by the court of appeals but explicitly set forth in the district court opinion, that a new trial should not be granted. The district court concluded that its prior discussion of the basis for the jury's contributory negligence assessment and the court of appeals' discussion of that issue were both factually incorrect and that on reconsideration the jury's determination of a four percent contributory negligence factor was correct and did not warrant the granting of a new trial.

The district court denied the Petitioner's motion for a new trial and entered judgment in favor of the Respondent on the jury verdict subject to the 4% reduction based on the contributory negligence assessment. On March 3, 1983, the Petitioner filed a Notice of Appeal from the final judgment entered by the district court.

On April 16, 1983, pursuant to this court's request, the Respondent filed a response to the Petition. On May 16, 1983, this Court denied the first Petition.

On June 17, 1983, the court of appeals in a short order affirmed the district court's entry of judgment on the jury verdict (Appendix G).

On September 15, 1983, the Petitioner filed its second Petition for a Writ of Certiorari in this case. In the Petition at page 2, the Petitioner asserts that its seeks review of both decisions of the court of appeals — that of September 14, 1982 vacating the judgment based on the remittitur and that of June 17, 1983 affirming the entry of judgment on the jury verdict.

SUMMARY OF ARGUMENT

The decisions of the court of appeals do not involve any novel or complex issue nor do they in any way conflict with the decisions of this Court or those of other courts of appeals. Thus, there is no important or special reasons for the granting of the Petition in this case. The only difference in the posture of the case now compared to that of May 1983 when this Court denied the prior Petition is the existence of the court of appeals' second decision (Appendix G) which affirmed the entry of judgment on the jury verdict. The Petitioner has set forth eight questions presented for review. Questions numbered 1-4 and 8 are identical to the five questions raised in the first Petition. The three "new" questions simply set forth in various forms the Petitioner's claim that the district court on remand did not follow the mandate of the court of appeals. This claim is completely the product of the Petitioner's imagination. The court of appeals rejected the Petitioner's argument that the district court somehow ignored the appellate court's mandate.

Despite the Petitioner's hollow and oft-repeated claim that it has somehow been denied the right to a jury trial, the plain fact is that the judgment the Petitioner seeks to attack is based on a jury verdict. After all this time and through many briefs and appeals, the Petitioner still is attempting to avoid the original verdict reached by the jury in June 1981 which must now be finalized and enforced. Before the district court committed its first (self-confessed) error in stating that the 4% contributory negligence assessment was not supported by the evidence, the jury had properly concluded that (1) plaintiff's injury was caused by the defendant, (2) the damages amounted to \$528,000 and (3) the plaintiff was guilty of 4% contributory negligence. The parties both received their jury trial. The jury has spoken and its verdict must be enforced.

It is now clear that the jury verdict was correct and the Respondent was entitled to judgment on the verdict. The fact that in the interim the case went up and down on appeal cannot change the fact that the jury has spoken and that the Respondent is entitled to the benefit of the jury's decision. There is not and never was any basis for requiring another trial. The Petitioner is simply upset that its own appeal of the original judgment has resulted in the imposition of greater liability against it. Had the Petitioner not appealed the remitted judgment, its liability would have been reduced by 25%. However frustrated the Petitioner may be with the fact that its own appeal backfired on it monetarily, this outcome did not result from any violation of the Petitioner's right to a jury trial. The Petitioner could have been similarly disappointed by a retrial which resulted in a larger damage award.

There has been no interference with the right to a jury trial since all issues were fully and properly submitted to the jury. The result now is that, after the remand, the jury's verdict has been fully implemented.

The Petitioner does not attack the court of appeals holding that the remittitur was improper. In fact, the Petitioner urged that result in the court of appeals. The Petitioner does not argue with the order of the court of appeals which reversed the judgment of the district court.

The Petitioner's argument relates to the rather simple but highly theoretical and conceptual question as to what remained of the district court judgment and order after the remittitur was held invalid. The district court had entered a conditional order to the effect that a new trial would be granted unless the Respondent accepted a remittitur. The Respondent accepted the remittitur and thus a new trial was not granted. The court of appeals held that the district court had no authority to order a remittitur relating to contributory negligence.

The remaining issue concerned the status of the case on remand. The Petitioner argues that after the dis-

trict court judgment was reversed, the conditional order granting a new trial somehow became effective, unconditional, mandatory and immutable. The Petitioner argues at page 8 of the Petition that it appealed only from that portion of the district court order conditionally granting a new trial. The Petitioner claimed that since the remittitur was improper it was entitled to an order unconditionally granting a new trial. The Petitioner does not explain how such a conditional, interlocutory order was subject to appeal.

Once the court of appeals reversed the district court's order, the order conditionally granting a new trial had no continuing life, vitality or effect. The only alternative left to the court of appeals, whether it considered the Respondent's cross-appeal or not, was to remand the entire case to the district court to rule on the outstanding motion for a new trial. On remand, in the absence of a final order or judgment, the district court was itself free to consider *ab initio* the motion for a new trial.

This Court need not decide whether the court of appeals had jurisdiction over the cross-appeal because the court of appeals had power to reverse the judgment and remand without considering the cross-appeal.

After the final judgment was properly vacated by the court of appeals, on remand the district court had the inherent power to rescind or modify its interlocutory order granting a new trial. Since the new trial order was conditional and the condition failed, first because the Respondent accepted the remittitur and second because of legal impossibility, simple logic dictates that the new trial order itself failed and could not revive on its own. Moreover, since the district court entered the order conditionally, it was only proper for the court of appeals to remand to allow the district court to decide what action it should take with knowledge that the remittitur device was not available to it.

In order to suggest a basis for the granting of a Writ, the Petitioner argues that the court of appeals' decision

conflicts with this Court's decision in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) which prohibits appeals by a plaintiff who has accepted a damage remittitur attacked as an abuse of discretion. Since the court of appeals held that the district court had no authority to offer the remittitur, the *Donovan* rule does not apply. The *Donovan* rule prohibits a plaintiff from attacking a remittitur by way of appeal on the theory that the plaintiff cannot attack that to which he has consented. The rule was created in a case where the power to order a remittitur was not being questioned. The question on appeal was one of abuse of discretion in granting a remittitur. The rule cannot be extended to apply to a situation where the district court was without authority to utilize the remittitur device. In this case, the Respondent was not attacking the remittitur; the Petitioner had successfully done that. In this case, the Respondent was attacking the order conditionally granting a new trial. See Rule 50(c). The result reached by the court of appeals was correct even if the court did not have the power to consider the appeal. Without considering the appeal, the court of appeals had authority to remand to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

A. The court of appeals had jurisdiction to entertain the Respondent's cross-appeal.

Although the Respondent does not believe that it was necessary for the court of appeals to decide that it had jurisdiction over the cross-appeal (see Section B below), it is clear that the court of appeals did find that it had jurisdiction to consider the cross-appeal notwithstanding the fact that the Respondent had agreed to the remittitur.

The court of appeals properly distinguished *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) on

the ground that in the instant case the court had concluded that the district court did not have power to order a remittitur based upon an adjustment in the contributory negligence percentage. In *Donovan*, the remittitur was based upon an adjustment in the damages assessed by the jury. Prior decisions of this Court had held that such a remittitur on damages is permissible. A plaintiff who accepts a remittitur on damages is precluded from challenging the remittitur on appeal.

In *Donovan*, this Court spoke of remittitur in terms of the role of the courts in reviewing the size of jury verdicts. 429 U.S. at 649. As pointed out by the court of appeals, the remittitur which the district court used in this case did not involve a review of the size of the damage award but a change in the jury's assessment of comparative negligence. The decisions of this Court upholding damage remittiturs but precluding damage additurs (see *Dimick v. Schiedt*, 293 U.S. 474 (1935)) clearly require the conclusion that remittitur in regard to contributory negligence is an impermissible interference in the jury's province. Thus, the rule of *Donovan* cannot properly be applied to this case for two reasons: (1) the Respondent could not be bound by his consent to an act by the court which the court had no legal authority to take; and (2) the Respondent's cross-appeal, as considered by the court of appeals, did not attack the remittitur but the order conditionally granting the new trial. Once the court of appeals vacated the remittitur, the order conditionally granting the new trial remained before it for disposition.

In this case, the court of appeals found that the district court was absolutely without authority in ordering a remittitur in relation to contributory negligence because such a remittitur interfered with the right to a trial by jury. The Petitioner does not challenge the court of appeals' holding on the remittitur issue. The court of appeals stated that it was "conceptually difficult and practically unfair" to hold that the Respondent had waived its right to appeal by consenting to a judgment that no

longer existed. The case was before the court of appeals on the Petitioner's appeal and there was no reason not to entertain the Respondent's appeal. This Court's decision in *Donovan* simply does not speak to the unique facts of the instant case.

Since in accepting the remittitur the Respondent had specifically reserved his right to cross-appeal in the event of an appeal by the Petitioner (Appendix I), the Respondent's appeal was properly before the court of appeals.

B. The result reached by the court of appeals is correct even without a finding that it had jurisdiction to consider the cross-appeal.

The judgment of the district court from which the appeal and cross-appeal were taken is set forth at Appendix E to the Petition. There is but a single "JUDGMENT ON A REDUCED VERDICT." Once the court of appeals determined that the district court had no authority to order the remittitur, the court reversed the judgment of the district court. This reversal of the judgment of the district court had the effect of not only setting aside the remittitur but also setting aside the order conditionally granting the new trial. Once the court of appeals reversed the district court's judgment, nothing remained of that judgment. The Petitioner seems to argue that once the court of appeals properly held that the remittitur was impermissible, the conditional order granting a new trial somehow became effective and unconditional. It argues that its appeal was limited to attacking the remittitur and to its claim that it was entitled to an unconditional order for a new trial. The Petitioner argues that in its appeal, it could attack the conditional new trial order but that the Respondent could not argue that the new trial order should not have been granted even conditionally.

It is, of course, possible to argue that theoretically the two parts of the district court's order and judgment could be separated and that once the remittitur was set aside, the order for a new trial could stand on its own. However, this is not how the judgment and order were written. The two were structured in conditional language. The district court gave the Respondent the option of accepting the remittitur or facing a new trial. When the Respondent accepted the remittitur, the new trial grant no longer was operative. When the court of appeals held that the district court had no authority to impose such a condition upon the Respondent, the entire judgment and order had to be set aside by the court of appeals.

Once the court of appeals reversed as to the remittitur, even if the court of appeals had not gone on to discuss or consider the cross-appeal, the result on remand to the district court would have been the same. Once the court of appeals reversed the judgment of the district court, there was no longer in existence any final order or judgment in the case. Accordingly, upon remand, the district court had the authority, even without specific guidance or instructions from the court of appeals, to consider *de novo* granting a new trial.

The Petitioner has cited *United States ex rel. Greenhalgh v. F.B. Rich Co., Inc.*, 520 F.2d 886 (9th Cir. 1975) at page twenty-four of the Petition and now concedes that if the court of appeals had not discussed the new trial issue, upon remand, the district court would not have been bound by the law of the case to its own prior order granting a new trial and would have been free to rule *de novo* on the new trial question.² The Petitioner complains that the district court should have been allowed to do so without comment from the court of ap-

2. At page 21 of its prior Petition (82-1302), the Petitioner argued that under *Greenhalgh, supra*, on remand the district court would not have been free to reconsider the new trial question.

peals which may have interfered with the exercise of the district court's discretion.

In *Greenhalgh*, the doctrine of the law of the case was applied in a situation under Federal Rule of Civil Procedure 50(c) in which under the Rule, the court of appeals had specific authority not only to review the judgment n.o.v. but also the conditional order entered by the district court granting a new trial. In such cases, as the court of appeals noted in its opinion in this case (A-8), the Rule specifically requires a district court in granting a judgment n.o.v., to rule on the motion for a new trial on a conditional basis so that on appeal, both orders can be reviewed if necessary. Rule 50(c) specifically provides that the conditional order granting a new trial does not render the judgment a non-final judgment.

In deciding that it had jurisdiction to entertain the cross-appeal, the court of appeals found that the situation in the instant case was similar to the situations provided for in Rules 50(c) and 50(d). The court reasoned that if a conditional order granting a new trial does not affect finality and can be considered by courts of appeals under appropriate circumstances, the circumstances of the instant case required the same result. The court of appeals pointed out that under Rule 50(d), the court of appeals is not precluded from determining whether an appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted. That is precisely what the court of appeals did in this case.

Even if the district court did not reconsider the new trial question prior to conducting a second trial, clearly the propriety of requiring the new trial could have been raised in the court of appeals by Respondent after a second trial. Hindsight reveals that had a second trial been held, after that trial, the district court would have confessed its error in originally granting the motion for the new trial for the same reasons it set forth in its Opinion of January 18, 1983 (Appendix F). After the second trial,

the district court would have admitted that it should not have ordered the new trial. At the very least, the order granting the new trial would have been reviewed by the court of appeals following a second trial.

In *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969), the plaintiff refused to accept a remittitur as to damages. A second trial was held which resulted in a substantially lower damage award for the plaintiff. The plaintiff appealed alleging that the trial judge abused his discretion in granting the remittitur. The court of appeals agreed with the plaintiff, set aside the order granting the new trial and ordered reinstatement of the original verdict for the plaintiff. The same result was reached in this case without the need for a second trial.

The decision of the court of appeals in considering the cross-appeal can easily be sustained on alternative grounds. To reach the result it did, the court of appeals did not have to rely upon the existence of a cross-appeal. Since it had the case before it on the Petitioner's appeal, the court of appeals had authority to consider other issues raised by the case even in the absence of a cross-appeal. The requirement of a cross-appeal is a rule of practice and not a rule of jurisdiction. See *Lucas v. Gulf and Western Industries, Inc.*, 666 F.2d 800, 805 (3d Cir. 1981); *Scott v. University of Delaware*, 601 F.2d 76, 82-84 (3d Cir. 1979), cert. denied, 444 U.S. 931 (1979); *Butler v. First National Bank*, 552 F.2d 1112, 1114 (5th Cir. 1977); *Arnold's Hofbrau, Inc. v. George Hyman Construction Co., Inc.* 480 F.2d 1145, 1150 (D.C. Cir. 1973). See also 15 Wright, Miller and Cooper, *Federal Practice and Procedure* §3904 (1976). Cf. *Massachusetts Mutual Life Co. v. Ludwig*, 426 U.S. 479 (1976). Thus even if the Respondent had not filed a cross-appeal, the court of appeals had jurisdiction to review the status of the conditional order granting the new trial. Indeed the Petitioner argues that in its appeal it attacked the new trial order arguing that it should have been unconditional.

28 U.S.C. §2106, set forth at page iv, above, specifically provides that an appellate court may modify, vacate, set aside or reverse any judgment lawfully brought before it for review. The Petitioner herein brought the district court judgment before the court of appeals. Without even considering the cross-appeal, the court of appeals had authority, after vacating the final judgment, to remand the case to the district court for further consideration.

In *Neely v. Eby Construction Co., Inc.*, 386 U.S. 1027 (1967), this Court upheld the authority of a court of appeals to order dismissal of an action after reversing the denial of a defendant's motion for judgment n.o.v. The Court held that as a matter of statutory power, the court of appeals had such authority under 28 U.S.C. §2106 and that this procedure was authorized under Rule 50(d). The Court held that under Rule 50(d), in the first instance, a court of appeals has authority to consider the new trial question. This does not interfere with the right to a jury trial.

Certainly the district court had authority to reconsider its new trial order after being told that the remittitur was improper and could not be attached as a condition to a new trial order. Understandably, the court of appeals did not want to engage in idle speculation as to how the district court *might* have ruled in the first instance if it had known that a remittitur was not available to it. Under these circumstances, the proper alternative was to remand to the district court which was in a better position to pass on the new trial question unrelated to the remittitur. See *Iacurci v. Lummus*, 387 U.S. 86 (1967).

The court of appeals did not consider the cross-appeal and did not act on the cross-appeal. Instead the court of appeals properly left the determination to the discretion of the district court. Certainly, that approach was more favorable to the Petitioner rather than having the court of appeals order judgment entered on the jury

verdict without the necessity of reconsideration by the district court. In *Ferguson v. Chester A. Poling, Inc.*, 285 N.Y.S. 340, 247 A.D. 727 (2d Dept. 1936), cited by the court of appeals, the appellate court under these same circumstances ordered judgment entered on the jury verdict without consideration by the trial court of the motion for a new trial. The Appellate Division held that "in theory and amount the question of apportioning the negligence was peculiarly within the province of the jury . . ." 285 N.Y.S. at 341. *Ferguson* also was a Jones Act action by a seaman for personal injuries.

C. The court of appeals did not in any way interfere with the Petitioner's right to a trial by jury nor did the court of appeals interfere with the discretion of the district court.

It must be emphasized that the court of appeals took no specific action with regard to the grant of the motion for a new trial. The court of appeals merely reversed the judgment and remanded the entire case to the district court so that the district court could exercise its own discretion.

The Petitioner claims that somehow the action of the court of appeals violated its right to a trial by jury under the Seventh Amendment to the United States Constitution. This argument makes absolutely no sense. The only jury verdict that exists is the one rendered in favor of the Respondent which included a finding of four percent contributory negligence by the Respondent. It is now clear that the district court improperly interfered with the Respondent's right to a jury trial by interfering with the jury's assessment of contributory negligence. That error was corrected in part by the court of appeals when it set aside the remittitur. On remand, the district court reconsidered the motion for a new trial and properly concluded that the jury's contributory negligence assessment was correct and that therefore a new trial

was not only unnecessary but inappropriate. The parties are now left where they should have been following the jury verdict in June 1981.

The Petitioner claims that the court of appeals interfered improperly with the district court's discretionary review of the facts found by the jury. As it would do in a Rule 50(c) situation, the court of appeals merely reviewed the record to determine the district court's "grounds for granting . . . the motion for the new trial".

What the court of appeals did was point out to the district court that the district court's opinion did not adequately set forth the court's reasons for finding that the jury had no basis upon which to find the four percent contributory negligence. The court of appeals noted in passing that, based upon its review of the record, there was at least one theory under which the jury's assessment of contributory negligence appeared to be sustainable. Nevertheless, the court of appeals deferred totally to the district court's own review of the facts.

The court of appeals made no finding with respect to its theory of contributory negligence but merely pointed out to the district court that the district court's opinion did not make it clear whether the district court had considered that possibility. Certainly the court of appeals had the authority, if not the obligation, to point out to the district court that the latter's basis for ordering a new trial needed further elaboration.

The Petitioner claims that the court of appeals' discussion interfered with the discretion of the district court. The district court's opinion on remand makes it abundantly clear that the district court exercised its own discretion without being unduly influenced by the discussion set forth by the court of appeals. The clearest proof of this is the fact that the district court in denying the motion for a new trial "carefully reviewed the evidence" again (Appendix F-9). The district court states

that this review resulted in a "significantly altered perception" of the basis for the jury finding the four percent contributory negligence.

The district court candidly admitted that its original order conditionally granting the new trial was based on a misperception but it went on to say that the suggested theory offered by the court of appeals was also not correct. Thus, the district court clearly reached its own independent conclusion concerning the propriety of granting the motion for a new trial and thereby it showed that it was not unduly influenced by the discussion in the court of appeals' opinion.

The court of appeals made it abundantly clear in Part II-B of its opinion (A-9) that upon remand, the district court was to exercise its own independent discretion whether to grant a new trial or not and, if a new trial were granted, to determine the scope of the issues to be covered in the new trial. The court of appeals stated that in the event of a new trial, it was not necessary to retry the damage issue. The court of appeals found that based upon the detailed special verdicts, it was possible to separate out the damage issue from the liability issue and the contributory negligence issue. Nevertheless, the court of appeals left the final decision to the district court in the exercise of its discretion and based upon its unique "feel" of the case. In view of the emphasis given by the court of appeals to the fact that the trial judge had discretion in all these areas, the Petitioner's claim of prejudice in the form of undue influence is clearly unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the court of appeals are correct on the merits and do not in any event present any novel or complex issue or a conflict between circuits. Nor do the decisions conflict with any decision of this Court. Nothing said or done by the court of appeals warrants review by this Court. Judgment has properly been entered on the jury verdict in favor of the Respondent and there is no warrant to set it aside or to require a new trial on any issue. Accordingly, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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